No. 55

OCT 2 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $3,674,

and

DONALD J. ANGELINI,

Claimant-Respondent.

BRIEF FOR CLAIMANT-RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 477

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $8,674,

and

DONALD J. ANGELINI,
Claimant-Respondent.

BRIEF FOR CLAIMANT-RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 393 F. 2d 499.

JURISDICTION

The judgment of the Court of Appeals (App. B, pp. 14-15) was entered on April 9, 1968. On motion of the petitioner timely filed, Mr. Justice Marshall of this Court extended time for filing the Petition herein to September 6, and said Petition was duly filed on September 4. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether persons asserting the privilege against self-incrimination as a ground for non-compliance with the registration and return requirements of Title 26, U.S.C., §4411 and §4412, which statutes have been found constitutionally unenforceable in their present form, can be penalized therefor in a quasi-criminal forfeiture proceeding.

2. Whether compelling reasons exist for not giving effect on this direct appeal to the change in law recognized by this Court in *Marchetti* v. *United States*, 390 U.S. 39 and *Grosso* v. *United States*, 390 U.S. 62.

3. Whether there is any true conflict between the Sixth Circuit in *United States* v. *One 1965 Buick, etc., et al.* (Pet. App. C-D, pp. 16-24) and this cause.

STATUTE INVOLVED

26 U.S.C. 7302 provides, in pertinent part:

> "It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. * * *"

STATEMENT OF THE CASE

On February 18, 1964, a libel was filed herein seeking to forfeit the respondent, $8,674.00, stating as a cause of action that from about August 1 to August 24, 1963, one Donald Angelini was operating a business in violation of Title 26, U.S.C., Section 4401, 4411, 4412, and 4901, and that on one or more of those dates between August 1 and August 24, 1963, the respondent monies had been used or were intended to be used in violation of the Internal Revenue Laws of the United States. It was further alleged in said libel that on August 24, 1963, the respondent monies were seized by agents of the United States Treasury Department. (A. 6)

On or about June 3, 1964, leave was given to Donald Angelini to intervene and file his claim and answer, which he did, claiming ownership of the respondent monies, and, answering the libel, admitted the seizure of the respondent monies from his person, and substantially denied all other allegations, including that the monies were forfeit to the United States of America. (A. 2)

On June 15 and 16, 1965, the case was heard by the Honorable Bernard M. Decker, sitting without a jury, and taken under advisement. (A. 3-4, 8-39)

On August 25, 1965, the Court entered its written Findings of Fact and Conclusions of Law and Judgment Order declaring the respondent monies forfeit to the District Director of Internal Revenue. (A. 40-42)

In essence the court found that from August 1 to 24 of 1963, there was being operated and conducted a bookmaking business in Sportman's Park, Cicero, Illinois, without payment of the occupational tax of $50.00 as required by 26 U.S.C. 4411 and without registration with the District Director of Internal Revenue as required by 26 U.S.C. 4412; that, thus, the wagering business was being operated and conducted in violation of 26 U.S.C. 4901. The court also found, as a fact, that the respondent monies in the amount of $8,674.00 was being used in this bookmaking business and was an integral part of the business and was intended to be used in violation of the Internal Revenue laws. The court thus concluded that the said respondent monies were forfeit to the United States of America under the provisions of 26 U.S. 7302. (A. 40-41)

On appeal from the judgment of forfeiture, the main basis of attack was the constitutionality of Title 26, U.S.C., §4411 and 4412 on the ground that they were violative of the privilege against self-incrimination. The Court of Appeals, though it expressed its cognition that the constitutional validity question was pending in this Court then on a grant of certiorari, felt itself compelled to dispose of the case with dispatch and bound by *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. (379 F. 2d 948) Petition for Certiorari was taken to this Court, (798, 1967 Term), and the judgment of forfeiture was vacated by this court and the cause was remanded to the Seventh Circuit for reconsideration in the light of the *Marchetti* and *Grosso* decisions, (390 U.S. 204).

On reconsideration, the Seventh Circuit held:

> "The only apparent purpose of 26 U.S.C. §7302, as applied here, is to punish violators of Sections 4411

and 4412 of the Internal Revenue Code by taking away money used in committing the violations. See One 1958 Plymouth Sedan v. Com. of Pennsylvania, 380 U.S. 693, 700, 85 S.Ct. 1246, 14 L.Ed.2d 170. As a practical matter, *Marchetti* means that such violations are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture." *United States* v. *U.S. Coin and Currency, etc.*, 7 Cir., 393 F. 2d 499, 500.

It thereupon reversed the judgment of forfeiture and remanded the case for the entry of judgment for this respondent. (Pet. App. D, pgs. 14-15) It is from this judgment that the Petitioner, United States of America, prays the Writ of Certiorari will issue to the United States Court of Appeals for the Seventh Circuit.

THE EVIDENCE

Between the dates, August 1 and 24, 1964, Internal Revenue had a vast surveillance for the purpose of observing wagering activities (other than pari-mutuels) at Sportsmans Park Race Track in Cicero, Illinois, a town bordering on the western outskirts of Chicago. The claimant-petitioner, Donald J. Angelini was one of the persons who came within the orbit of that surveillance. Donald J. Angelini was seen in the course of the surveillance accepting money from some persons and giving money to other persons. Some of the persons to whom he gave money and some of those from whom he accepted money during the month of August were in the wagering business. It is by association of the claimant-respondent with those persons—some of whom had accepted wagers from Internal Revenue Agents—that this money was declared forfeit. (A. 8-28)

Arrest warrants issued for many of the persons under surveillance, claimant-respondent Donald Angelini among them, and they were executed on August 24, 1963.[1] When Mr. Angelini was served with the arrest warrant, he was taken to the United States Courthouse and there directed to empty his pockets. Included in the effects in his pockets were the respondent moneys. (A. 24) Also on his person were documents which an expert government witness testified were recap sheets. (A. 35-39) These recap sheets corresponded in some particulars with betting cards taken from another person arrested, one Joseph Altiere. (A. 34-39) (See *Altiere* v. *United States*, 382 U.S. 367).

[1] This respondent was convicted of wilful failure to register and pay the occupational tax required by Title 26, U.S.C. §4411 and 4412 and was sentenced to 60 days imprisonment and fined $2500.00. On his Petition for Certiorari to this Court he urged the unconstitutionality of those statutes (See *Angelini* v. *United States*, No. 377, October Term, 1965). Certiorari was denied. 382 U.S. 838. Respondent served the sentence, and paid the fine.

ARGUMENT

I.

It is the government's position that the decision below represents an extension of the *Marchetti-Grosso* rationale beyond its express terms and, therefore, this Court should issue its Writ of Certiorari to limit those holdings only to criminal cases. That is not the interpretation put on this Court's decisions by United States Courts. See *United States* v. *Riccio,* N.D.Ill., 282 F. Supp. 979, from which decision the United States has not elected to appeal.

> "*Marchetti* did not turn on the type of proceeding in which the privilege is asserted. The fact that the proceedings at which the privilege is claimed are criminal is not what triggers the validity of the claim of privilege; rather, it is the risk of prosecution for substantive crimes by both federal and state authorities, which makes the information requirement constitutionally infirm when met with the claim of privilege." (282 F. Supp. at 982)

See also *United States* v. *$3296 in Currency,* N.D.N.Y., 286 F. Supp. 543. *United States* v. *One 1967 Buick Electra,* D.C.N.J., 37 L.W. 2172.

The government argues that neither *Boyd* v. *United States,* 116 U.S. 616 nor *One 1958 Plymouth Sedan* v. *Philadelphia, Pennsylvania,* 380 U.S. 693, relied upon by the United States Court of Appeals for the Seventh Circuit requires the result reached by that court in vacating the forfeiture. We disagree. The law established in the great case of *Boyd,* reaffirmed over and again by this court, allows of no other decision. *Boyd* stands for the proposition that forfeiture cannot be based on compelled testi-

mony. This case stands for the proposition that forfeiture will not ensue for a failure to incriminate oneself. This Court held in *Boyd* that a compulsory production of a man's private papers to forfeit his property is within the protective scope of the Fourth Amendment to the Constitution. (116 U.S. at 622) The argument of the United States is that resistance to the unconstitutional compulsion results in forfeiture of property. The argument of the government here is incriminate yourself or forfeit your property. The hazards of compliance with Sections 4411 and 4412 in the State of Illinois were clearly recognized by the United States Court of Appeals for the Seventh Circuit as being the same as those encountered by *Marchetti,* which this court considered real and appreciable (See Appendix A, Petition, page 13).

The alternative presented by the government was, in a different context aptly put by this court in *Boyd.* The registration proceedings present the sad alternative of extortion "from the party his private books and papers to make him liable for a penalty *or* to forfeit his property." (116 U.S. at 624) In this case, the interpretation of "or" is an alternative rather than a conjunction, but the force is the same. "Such a choice was impermissible under the Fourth and Fifth Amendments". (Petitioner's Appendix, page 13) This court did not see any distinction based on the forfeiture nature of the action that the United States attempts to make.

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constition, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are

further of opinion that compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure within the meaning of the Fourth Amendment." *Boyd* v *United States,* 116 U.S. 616, 634-635.

The government argues that *Boyd* and *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, are factually dissimilar in that one involved an *affirmative* violation of a constitutional protection, and the other the use of illegally obtained evidence. In the latter case, the Commonwealth of Pennsylvania equally attempted to distinguish *One 1958 Plymouth Sedan* v. *Pennsylvania,* from *Boyd* (380 U.S. at 698). This court rejected the argument and reaffirmed the constitutional guarantees to be given effect whatever the vehicle (in the case—rather than the locomotive—sense). It rejected an attempt to restrict its own holdings to the confines of the particular case in which it ruled. This is necessary, of course, because this court does not rule ordinarily within the confines of the case tendered to it, but it announces general policies to be applied to all relevant circumstances.

Perhaps because the Sixth Circuit in *United States* v. *One 1965 Buick, etc., et al* (Pet. App. C & D, pp. 16-24) seemed preoccupied with the taxing power of the United States, its urging of Reasons for this Court to grant its Writ begins with the untrammelled and unfettered power to collect taxes civilly.

The United States thus states:

"Accordingly, a person who engages in the business of accepting wagers remains in violation of the wager-

> ing tax laws if he fails to register or pay the prescribed taxes. Although he cannot be punished criminally for such non-compliance, the occupational and excise taxes can still be collected in a civil proceeding." (Page 5, Its Petition)

This point does not arise in this case. This respondent has been assessed the occupational and excise taxes imposed by §4411 and 4412 by the Internal Revenue Service, and has, under protest, paid them as assessed. We are not here concerned with the collections of those taxes. Only forfeiture is involved.

The United States urges that the continuing requirement of the payment of the occupational and excise taxes "Is equally consistent with the rationale of *Marchetti-Grosso* that property used in the violation of Sections 4411 and 4412 is forfeitable under 26 U.S.C. §7302."

Thus, the United States argues that the tax laws should be equated with the forfeiture laws, rather than that the criminal laws governing this subject should be equated with the forfeiture laws. We submit that is absolutely and completely inconsistent with this court's ruling in *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693. In that case it was pointed out that McGonigle, the claimant, would, if prosecuted for the state laws allegedly violated, be subject to a lesser fine than the value of the car for which forfeiture was sought.

This Court found an anomaly in allowing evidence in the forfeiture, but forbidding it in the criminal proceedings. (See 380 U.S. at 701) We submit it is equally anomalous for the United States to suggest this Court hold the provisions of 4411 and 4412 constitutionally unenforceable in the criminal misdemeanor actions, but say at the same time that a heavy civil penalty may ensue by bringing this purportedly civil, but actually quasi-criminal, proceeding.

In arriving at the "equal consistency" argument the United States (p. 5, Its Petition) advances two arguments to this court:

(1) That proof that the property was intended for use in wagering depends on evidence apart from any required declaration in connection with payment of the prescribed taxes, and

(2) That it is immaterial whether the person whose property is seized for such use is the one who must pay the taxes, continuing that the forfeiture proceedings are *in rem* not *in personam*, and are against the defending property, not an individual.

As to (1) above, the United States continues at pages 8 and 9 of its Petition that "Proof of wagering warranting forfeiture is independent of proof of non-payment of the prescribed taxes. While non-payment must be shown, proof that the owner of the property was himself the person liable for the taxes is not necessarily required. In short, the impact of a forfeiture on the privilege against self-incrimination is *at most collateral and indirect.*" (Pp. 8-9, Its Brief)

We agree that the proof of wagering is an element necessary to forfeiture under 7302, but without proof of omitting registration and the paying of the occupational tax under 4411 and 4412 *there can be no forfeiture.* There is no federal law that proscribes gambling in and of itself, divorced from the element of interstate commerce or taxation. The principle interest of the United States under the wagering tax statutes is the collection of revenue, and not the prosecution of gamblers. *United States* v. *Calamaro,* 354 U.S. 351. This argument of the government is not even specious, it does not even have the slightest semblance of vitality.

(2) It would seem that this court's decision in *Boyd* also answers conclusively the argument of the government attempting to distinguish these *in rem* proceedings from the *in personam* criminal proceeding. This court long ago recognized the "relationship of the personal privilege against self-incrimination to proceedings to forfeit property", and found it intimate and not "peripheral". (See United States Petition, page 6)

> "In *U. S.* v. *Mason, Judge* Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' *
>
> * * *
>
> "But, as before said, although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party, he is nevertheless the substantial party to the suit; he certainly is so, after making claim and defense; and in a case like the present he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense." *Boyd* v. *United States,* 116 U.S. 616, 637-638.

II.

Under this point, the government urges this court issue its Writ of Certiorari in the captioned cause for the purpose of declaring that the *Marchetti-Grosso* rationale be applied to forfeitures only to cases tried after this court's ruling in those cases. It urges in support of its position that recent cases of this court have limited newly adopted criminal rules, which do not bear on the integrity of the guilt-determining process, to prospective application.

What the United States overlooks in evaluating those cases is that they are exceptions to the rule of complete or limited retroactivity, and prospective application resulted only because of overwhelming contravailing considerations. The first case relied on, *Linkletter* v. *Walker*, 381 U.S. 618, made that eminently clear. It cited Mr. Justice Holmes dissent in *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, disclaiming knowledge of any authority for making law only for the future, and emphasizing that judicial decisions have had retrospective application "for near a thousand years." (fn. 6, 381 U.S. at 622). The case emphasized the distinction between new law and true law, and true law is the essence of *Marchetti-Grosso*. It is old law that a man may not be compelled to incriminate himself; it is old law that he cannot be punished for refusing self-incrimination. But it also recognized that when a case wrongly decided (here *Kahriger-Lewis*) is overruled, intermediate cases "finally decided" are not to be disturbed. But this case is not finally decided. The moneys here have not been definitively condemned (381 U.S. at 625-626), and should be restored.

After a complete review of the history regarding the question, this Court concluded:

"Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, Schooner Peggy, supra, and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations * * * and particular conduct * * * of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' Chicot County Drainage Dist. v. Baxter State Bank, supra, 308 U.S., at 374, 60 S.Ct. at 319." *Linkletter* v. *Walker*, 381 U.S. 618, 627.

It would seem that (1) above would conclude the Government's argument as to this case.

Recently the United States Court of Appeals for the Second Circuit, sitting en banc, recognized retroactivity as the basic rule, when faced with the recently recurring urgings of the United States for prospective application only, but it continued in analysis of the cases urged there as they are here, as standing to justify prospective application:

"In *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n. 3 (1966), the Court similarly treated the rule announced in *Griffin* v. *California*, 380 U.S. 609 (1965), which forbade adverse comment by prosecutors and judges on the failure of a defendant to testify in a state criminal trial. However, relying on the later-decided opinions in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Government counters that the Supreme Court did not realize what it was doing in the earlier decisions discussed above. The Government claims that 'if the Court had ever considered the question squarely' in those earlier decisions, it would have ruled the other

way. However, a careful consideration of even the cases relied on by the Government and of the underlying considerations leads us to reaffirm *Sheller*.

In *Stovall* v. *Denno, supra*, the Supreme Court considered the retroactivity of the rules announced in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), which required 'the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of his counsel.' 388 U.S. at 294. The Court pointed out, *id.* at 296-97, that the *Linkletter*, *Tehan*, and *Johnson* cases

> 'establish the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application' . . . ." [Citation omitted.] The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'

"Applying these criteria in *Stovall*, the Court held that the new rules were prospective only and refused to distinguish between 'convictions now final . . . and convictions at various stages of trial and direct review.' It regarded 'the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable.' *Id.* at 300-01. The analysis in *Johnson* v. *New Jersey*, 384 U.S. 719, 726-33 (1966), also relied on by the Government, was similar." *United States* v. *John D. Tarrago*, 2 Cir., Docket No. 30416, Sept. Term, 1967.

On the other hand, applying this reasoning to the question in this case, leads to a completely opposite result.

Extending the *Marchetti-Grosso* rule to forfeiture cases still on appeal when it was announced will place no significant "burden on the administration of justice." In *Stovall* and *Johnson*, the court was obviously concerned that great numbers of cases might be reopened even by limited retroactivity. The United States has not demonstrated any interest in how many cases that might be, and does not inform this court of any such considerations that might color its determination of the degree of retroactive application of *Marchetti-Grosso*. However, inquiry by your respondent has come to a conclusion that only one case in this (the 7th) circuit awaits the outcome of this determination, that is *United States* v. *One 1967 Cadillac*, an appeal from the Eastern District of Illinois, and docketed in the United States Court of Appeals for the Seventh Circuit under its number 16732. The United States Court of Appeals for the Seventh Circuit can hardly be considered a minor circuit, either geographic- or population-wise, and if, as is altogether possible this is a reflection of the cases to be effected by limited retroactivity, the burden on law administration is minimal to the near extent of nonexistence. Moreover, as the Second Circuit said, no further hearings will have to be held on "the excludability of evidence long since destroyed, misplaced or deteriorated, compare *Linkletter* v. *Walker*, 381 U.S. at 637. There is no problem here of "a legalized mass of jail break by rapists, murderers, and other felons." See *Schwartz*, retroactivity reliability and due process: a reply to Professor Mishkin, 33 U.Chi. L.Rev. 719, note 4, page 745.

Similarly, no overpowering argument of reliance by "law enforcement authorities" can be made. The respondent monies seized here, were seized as an incident to Mr. Angelini's arrest, for violation of Section 7203 in that he

did wilfully fail to comply with Sections 4411 and 4412 of Title 26. Nothing was done in reliance upon former decisions on the search incident to arrest, searches incident to arrest are not affected by this decision. No law affecting the right to search incident to arrest has been changed.

Further the government says at page 7 of its Petition:

> "Not only is the question presented an important one, but the present confusion for enforcement officials and those subjected to forfeitures is of sufficient magnitude to warrant resolution."

What present confusion? What warrant will issue, either arrest or search, under the authority of 7203 for failure to comply with 4411 and 4412 of Title 26?

In *Boyd* v. *United States*, 116 U.S. 616, this court spoke of reliance by law enforcement authorities on the old standards, and in speaking said:

> "No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it, in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *Consuetudo est optimus interpres legum:* and another maxim that *Contemporanea expositio est optima et fortissima in lege.* But we do not find any long usage or any contemporary construction of the Constitution which would justify any of the Acts of Congress now under consideration." *Boyd* v. *United States*, 116 U.S. 616, 622.

There is no reliance by law enforcement authorities on any standards that allow 26 U.S.C. 7302 to be employed to authorize forfeiture for violation of laws, which laws themselves are determined to be constitutionally unenforceable. Future and present arrests, for such alleged violations as 4411 and 4412, are under *Marchetti* and

Grosso out of the question, and if they have been performed, those cases have long since been dismissed.

If the government agents "obviously relied upon the prior holdings of this court specifically opposing the validity of the wagering tax statutes. *United States* v. *Kahriger*, 345 U.S. 22; *Lewis* v. *United States*, 348 U.S. 419," why is the argument about retroactivity not equally applied to criminal cases? Why would not the rule of *Marchetti* and *Grosso* be as measurably furthered by prospective application of those decisions to criminal cases? The government does not answer that question, they merely say that they have not "urged the non-retroactivity of *Marchetti-Grosso* with respect to criminal prosecutions." (page 9, Their Petition) They did elucidate a different result was justified in forfeiture proceedings. Are they saying that an $8,500.00 fine for a criminal violation would not have been a tremendous impact?

All of the cases relied on by the United States stood for the proposition that the defendants convicted could, and probably would, have anyway have been convicted under the present-existing rules of evidence. The theory has no application to this case. It was here necessary to prove that the government show that this claimant-respondent had not filed the Form 11, created pursuant to Section 4412 of Title 26, U.S.C. The *Marchetti-Grosso* cases determined that since the filing of Form 11-C had built-in incrimination under state laws, the requirement of filing, without constitutionally enacted safeguards against self-incrimination, was violative of the Fourth and Fifth Amendments of the Constitution of the United States.

The "guilt determining process" has no integrity apart from the self-incriminatory requirement imposed by 4411 and 4412 so as to make 7203 operative. We invite the

government to show how a "wilful" failure to comply with the provisions of 4411 and 4412 can be made to determine guilt without a showing that compliance with those sections would have breached the privilege against self-incrimination while the law stands in its present form. The United States has not elected to make any argument to demonstrate that constitutionally secured convictions and forfeitures could have ensued without proof that a claimant was obliged to comply with the law enacted under 4411 and 4412 except by waiving his constitutional rights.

On the original Brief in opposition for the Writ of Certiorari, No. 798, October Term, 1967, the Solicitor General argued as follows:

> "We agree with petitioner that the resolution of the self-incrimination issue in the pending cases may have a bearing upon the validity of the forfeiture in this case. The basis of the libel is that the money was 'property intended for use in violating the provisions of the internal revenue laws.' This Court's determination as to whether the underlying tax statutes are or are not valid can thus affect the right to forfeit property intended for use in violation of such laws.
>
> "Accordingly, it would seem appropriate to defer action on the present petition until the *Marchetti* and *Grosso* cases are decided."

Later in that case the government filed what it called its Supplemental Memoranda for the United States in Opposition to the Petition for the Writ of Certiorari, and there urged upon this court the same arguments presented here in support of strict prospective application (as opposed to restricted retroactive application). There, as here, no facts were recited to deviate from the basic rule that has been enunciated hereinbefore. This court did not comment on that supplemental memorandum. In this Peti-

tion for the Writ, the United States twice adverts to the failure of the United States Court of Appeals for the Seventh Circuit to discuss the matter of retroactive application and applied by *Marchetti-Grosso* decisions to forfeitures (See Its Petition, pages 4 and 7). Neither on remand of cause number 798, October Term, 1967, was any urging for such consideration made, nor after that court's decision (Petitioner's Petition, Appendix A) was the Seventh Circuit even requested to consider retroactive, limited prospective, or unlimited prospective application, in forfeiture cases. Why, then, should there be any discussion! The United States argues that it has not urged strict prospective application in criminal cases, and, in fact, without more ado has forthwith dismissed its criminal prosecutions even on appeal, of cases brought pursuant to Section 7203 for failure to comply with Sections 4411 and 4412 of Title 26, U.S.C. It has not favored us with any more than conclusions on why one should be applied prospectively, and the other retrospectively. If the United States in a criminal prosecution obtained a fine of $8,500.00, it would indeed have had a big win, and fines are equated with forfeitures.

III.

The main opinion in *United States* v. *One Buick, etc.*, Defendants (See Pet. App. C), 392 F. 2d 672, goes mostly on the right of imposing civil liabilities for non-payment of taxes. THAT IS NOT INVOLVED HERE, as noted hereinbefore. The assessed occupational and excise taxes under Title 26, U.S.C. §4401 and 4411 have been paid. However, that case, on Petition for Rehearing (See Petitioner's Appendix D) indicates that "the court further found that the funds in the 'bank' did not belong to the Deans [the Claimants], but were merely gambling money in their custody" (Page 23), and later that "We do not

believe that the District Court should be required to determine the beneficial owners of the 'bank' which wagers constituted the fund . . . " Thus a powerful distinction exists between that case and this, and no real conflict is presented. Under the fact finding (first quotation) the Deans were not proper Claimants. Under the second quotation the Deans apparently concurred that there were other "beneficial owners of the bank" (and thus that others have a rightful claim to the fund), but who had not filed any claim or answer protesting the forfeiture.

However, the Court should consider that a rift in Circuits has been recognized by the United States District Court for the Northern District of New York on two occasions (See *United States* v. *$3,296 in Currency*, 286 F. Supp. 543, referring to and expressing agreement with *United States* v. *$125,882 in U. S. Currency*, ... F. Supp. ....., 68-1 U.S.T.C., p. 15,846 (S.D.N.Y. May 4, 1968) and by the District Court of New Jersey in *United States* v. *One Buick Electra*, D.C.N.J., 37 L.W. 2172. All followed the law as expressed in this case by the Seventh Circuit, expressly rejecting the Sixth Circuit decision, 392 F. 2d 672.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied, or in the alternative, that the Writ be granted, and the judgment of the Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

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